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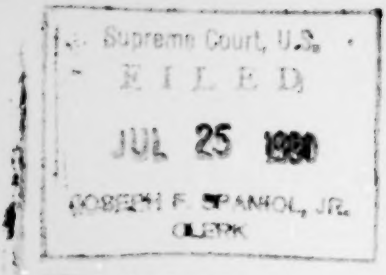

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BRUCE PHILIP LARSON, Petitioner,

v.

STATE OF MINNESOTA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

MINNESOTA SUPREME COURT

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QUESTIONS PRESENTED

1. Where a Competent, Available Witness Does Not Testify, Does the General Confrontation Clause Rule Requiring Unavailability Before Out-of-Court Statements are Admissible, Ohio v. Roberts, or the Exception to this Rule that Unavailability is not Constitutionally Required for the Admission of Statements of Co-Conspirators, United States v. Inadi, Govern the Admissibility of Out-of-Court Statements Which Do Not Meet Any of the Traditional Exceptions to the Hearsay Rule?

2. Is the Confrontation Clause Violated When a Defendant is Required to Call, or to Expressly Request the State to Call, a Declarant, Whose Out-of-Court Statements Have Been Admitted in Order to Exercise His Right of Cross-Examination?

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PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Petitioner, Bruce Philip Larson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Minnesota Supreme Court entered in the above entitled matter on March 23, 1990, as modified by Order of May 15, 1990.

I.

OPINIONS BELOW

The original opinion of the Minnesota Supreme Court, reported as State v. Larson, 453 N.W.2d 42 (Minn. 1990), is attached as Appendix A. The Court's May 15, 1990 Order denying the Petition for Rehearing but substituting a new page 7 to its opinion is attached as Appendix B. The opinion of the Minnesota Court of Appeals, reported as State v. Larson, 447 N.W.2d 593 (Minn. Ct.

App. 1989), is attached as Appendix C. Final Judgment is attached as Appendix D.

II.

JURISDICTION

After a jury trial, petitioner was convicted of a single act of criminal sexual conduct in the second degree, (sexual contact), and filed a timely appeal. On October 24, 1989, the Minnesota Court of Appeals issued an opinion remanding petitioner's case to the trial court. A Petition for Review by the Minnesota Supreme Court was filed and granted on December 15, 1989. On March 23, 1990, the Minnesota Supreme Court reversed the decision of the Minnesota Court of Appeals and affirmed the conviction. A Petition for Rehearing was filed on April 2, 1990. The Minnesota Supreme Court denied the petition on May 15, 1990, but

did substitute a new page 7 of the slip opinion for the page originally filed. Final judgment was entered on May 18, 1990.

This Court has jurisdiction to review the judgment of the Minnesota Supreme Court by Writ of Certiorari pursuant to 28 U.S.C. § 1257(a).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT VI:

> In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ....

UNITED STATES CONSTITUTION AMENDMENT XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

IV.

STATUTES/RULES INVOLVED

MINNESOTA STATUTE, § 595.02, SUBD. 3:

595.02. Testimony of witnesses.

Subd. 3. Certain out-of-court statements admissible. An out-of-court statement made by a child under the age of ten years or a person who is mentally impaired as defined in section 609.341, subdivision 6, alleging, explaining,

denying, or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse of the child or the person who is mentally impaired by another, not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:

(a) the court or person authorized to receive evidence finds, in hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability; and

(b) the child or person mentally impaired as defined in section 609.341, subdivision 6, either:

(i) testifies at the proceedings; or

(ii) is unavailable as a witness and

there is corroborative evidence of the act; and

(c) the proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement.

For purposes of this subdivision, an out-of-court statement includes video, audio, or other recorded statements. An unavailable witness includes an incompetent witness.

RULE 803 (24), MINNESOTA RULES OF EVIDENCE:

Other Exceptions. A statement not specifically covered by any of the

foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it,

including the name, address, and present whereabouts of the declarant.

V.

STATEMENT OF THE CASE

On November 2, 1987, petitioner was charged in Martin County District Court with a single count (multiple acts over an extended period of time) of criminal sexual conduct in the first degree (sexual penetration) of his daughter. The allegations first arose amidst petitioner's divorce and child custody dispute in May, 1987. Family court proceedings were immediately initiated and seven months later the criminal charge was filed. Petitioner asserted his innocence and maintained that the conduct did not occur or was perpetrated by someone else.

After the state filed notice of intent to use a number of out-of-court statements

made by his daughter pursuant to Minnesota Statute section 595.02 subd. 3, petitioner requested a hearing to challenge the constitutionality of the use of such statements. After a hearing on June 16, 1988, the trial court ruled the out-of-court statements were admissible, assuming for the purposes of that hearing that the child was incompetent. The trial court reconsidered its ruling in light of this Court's decision in Coy v. Iowa, 487 U.S. 1012 (1988), and held that, assuming the unavailability of the victim, the video tape of the out-of-court statements was not admissible, but the statements of the witness were admissible.

On August 30, 1988, pursuant to petitioner's request, the trial court held a competency hearing and found petitioner's daughter, who was then 5 years old, to be

competent to testify. The state, however, did not call this witness at trial, but instead offered the out-of-court statements she made in response to questioning on four separate occasions: (1) May 7, 1987 to law enforcement officers; (2) November 24, 1987 to law enforcement officers; (3) October 22, 1987 to a therapist; and (4) May 1, 1987 to a physician's assistant. Petitioner noted his continuing constitutional objections before trial and objected on the basis of hearsay during trial.

On September 3, 1988, the jury found petitioner guilty of a single act of criminal sexual conduct in the second degree (sexual contact). On November 14, 1988, the trial court sentenced petitioner to 24 months in prison. The trial court stayed execution of this sentence pending appeal.

Petitioner appealed his conviction to the Minnesota Court of Appeals. On October 24, 1989, the Minnesota Court of Appeals found that petitioner's rights to confrontation and due process were violated by admission of the out-of-court statements where the witness was available but did not testify. Two of the judges remanded petitioner's case for "re-enunciation of the basis for the trial court's competency determination" after finding that the court and the parties failed to focus on the implications of the competency determination. Appendix C 29-31. The third judge would have remanded for a new trial. Appendix C 33, 55.

Petitioner filed a Petition with the Minnesota Supreme Court for review of the decision of the Court of Appeals, challenging only the relief granted. On

December 15, 1989, the Minnesota Supreme Court granted the Petition For Review, but did not request further briefing or argument. On March 23, 1990, in a 6-1 decision, the Minnesota Supreme Court found no constitutional violations or other error and issued its decision reversing the decision of the Court of Appeals and affirming the judgment of conviction.

The Minnesota Supreme Court held that "the Constitution does not preclude the use of the victim's out-of-court statements unless the state has called her as a witness." Appendix A 11. The court stated that the decision of this Court in United States v. Inadi, 475 U.S. 387 (1986) "made it clear" that "the unavailability of the declarant is not always prerequisite to admissibility of hearsay evidence against the defendant in a criminal case." Appendix

A 15. (See also Appendix B 3: The court added the single word, "always," to the original page of the decision). Later in its opinion, the court stated, ". . . the availability of the witness is not determinative of the admissibility of extrajudicial statements . . . ." Appendix A 24.

The court also held that petitioner's ability to call his daughter, who was available though not called by the state, as a witness at his trial and cross-examine her regarding her out-of-court statements admitted against him satisfied any constitutional claim. Appendix A 15.

The Minnesota Supreme Court, rather than relying on Minn. Stat. § 595.02 subd. 3, then went on to "admit extrajudicial statements of child complainants or witnesses pursuant to" Minn. R. Evid. 803

(24)(residual exception), finding that the out-of-court statements had "equivalent circumstantial guarantees of trustworthiness" as other exceptions to the hearsay rule, and Minn. R. Evid. 803 (4)(medical diagnoses or treatment). Appendix A 18-21.

The court finally noted that a defendant who wants to cross-examine an available witness not called by the state but whose out-of-court statements are admitted should not be compelled to call the witness. The Court issued a prospective rule that the state must, when expressly requested by the defendant to do so, call in its case-in-chief an available witness whose hearsay statements are being admitted against the defendant. Appendix A 23-4.

On April 2, 1990, petitioner filed a

Petition For Rehearing with the Minnesota Supreme Court. On May 15, 1990, the Minnesota Supreme Court denied the Petition For Rehearing, but did substitute a new page 7 of the slip opinion for the page originally filed on March 23, 1990. See Appendix B 2-4. The final judgment was entered on May 18, 1990.

VI.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS THE OPPORTUNITY TO DECIDE WHETHER THE CONFRONTATION CLAUSE REQUIRES THE STATE TO SHOW A WITNESS IS UNAVAILABLE BEFORE OUT-OF-COURT STATEMENTS ARE ADMISSIBLE UNDER THE RESIDUAL EXCEPTION, AN IMPORTANT QUESTION WHICH WILL RECUR UNTIL DECIDED BY THIS COURT

In Idaho v. Wright, ___ U.S. ___ , (58

U.S.L.W. 5036 June 27, 1990), this Court held that the Confrontation Clause required a showing of the reliability of the out-of-court statements, which did not fit any of the firmly rooted exceptions to the hearsay rule, before the statements could be admitted. The "residual exception" to the hearsay rule was found not to be a firmly rooted hearsay exception.

The instant case presents the other half of the equation raised in Idaho v. Wright: does the Confrontation Clause require unavailability of a child witness before admitting out-of-court statements under the "residual exception?"

This Court noted that the questions which are presented in this case were not before it in Idaho v. Wright, supra at 5038:

> . . . (W)e first note that this case does not raise the question

whether, before a child's out-of-court statements are admitted, the Confrontation Clause requires the prosecution to show that a child is unavailable at trial- and, if so, what that showing requires.

This case raises the question of whether the "general approach" of the Confrontation Clause requirements this Court set in Ohio v. Roberts, requiring unavailability, applies to this case.

Minnesota's Ruling: Unavailability Not Required. The Minnesota Supreme Court relied on this Court's decision in United States v. Inadi, 475 U.S. 387 (1986), to find that there was no constitutional violation by admitting out-of-court statements of an available, competent witness who did not testify at trial, under the residual exception to the hearsay rule.

The Minnesota Supreme Court interpreted the Inadi opinion to hold that

the "confrontation clause does not normally require a showing that the declarant is unavailable in order to admit out-of-court statements" Appendix A 12-3; and that this Court "made it clear in Inadi that the unavailability of the declarant is not always prerequisite to admissibility of hearsay evidence against the defendant in a criminal case." Appendix A 15; Appendix B 3. (The court added "always" to this sentence in its Order denying rehearing.)

The Minnesota Supreme Court did not address the application of the "general approach" of confrontation requirements that this Court set in Ohio v. Roberts, 448 U.S. 56 (1980), to the facts in this case. Indeed, the court did not even cite that decision, apparently finding, as indicated by the above quoted language, that Inadi eliminated or reversed the "general

approach."

Of course, in Inadi, this Court held only that under the circumstances of that case, (involving a traditional hearsay exception for statements of co-conspirators and the practical considerations involving that type of statement), unavailability of the witness was not constitutionally required for admission of the statements.

Other decisions of this Court after Inadi suggest that the general approach of unavailability of the declarant is still constitutionally required. See e.g., Bourjaily v. United States, 483 U.S. 171 (1987); Lee v. Illinois, 476 U.S. 530 (1986); See also Idaho v. Wright, supra at 5038.

There is language, however, in this Court's decision in Inadi which, if read narrowly, could be interpreted as limiting

the holding in Roberts to cases involving former testimony. United States v. Inadi, supra at 392-4.

In Idaho v. Wright, this Court, after noting its application of the "general approach" regarding unavailability in other cases also noted its holding in Inadi, leaving open the question of which controls a situation like this. This Court stated that the question of the constitutional requirement of unavailability of a child witness was not before it.

Petitioner's case raises these questions: What does the Confrontation Clause require in terms of unavailability of a witness whose out-of-court statements do not fit any firmly rooted exception to the hearsay rule; If required, what is necessary to demonstrate it? As demonstrated later, infra at 25-31, these

are important questions which will recur until decided by this Court.

B. WHETHER THE ACCUSED CAN BE FORCED TO CALL A WITNESS WHOSE STATEMENTS HAVE BEEN ADMITTED IN ORDER TO EXERCISE HIS RIGHT TO CROSS-EXAMINATION IS AN IMPORTANT ONE WHICH WILL RECUR UNTIL DECIDED BY THIS COURT

Minnesota's Ruling: Defendant's Ability to Call Witness Whose Statements have been Admitted to Cross-Examine Satisfies Constitution. While the Minnesota Supreme Court held that unavailability was not required, it also addressed the question of what availability is from a constitutional sense. This important question has also not been answered by this Court.

The Minnesota Supreme Court, picking language out of context from this Court's decision in Inadi, held that petitioner's ability to call the declarant as a witness at trial and cross-examine satisfied any constitutional claim. Appendix A 14-5.

The Minnesota Supreme Court went from very narrow, fact specific language in Inadi, expanded upon it and applied it to a completely different situation. In Inadi this Court did not hold that the defendant's ability to call a witness satisfies all constitutional claims. It only held that the benefits of requiring unavailability, under the facts of that case, did not outweigh the substantial burdens that it would impose: the ability of the defendant to call a witness was only one of the many factors considered by this Court in reaching that conclusion.

The Minnesota Supreme Court seemed to sense constitutional problems with forcing a defendant to call a witness in order to cross-examine on the out-of-court statements and fashioned a different rule for future cases: upon the express request of the defendant, the state must call in its case-in-chief an available witness whose hearsay statements have been admitted against the defendant. Appendix A 23-4. The court, however, failed to address the clear constitutional violations presented by its ruling in petitioner's case. More importantly, though, even the court's prospective rule raises significant constitutional issues which were not addressed.

The court's reasoning also is constitutionally in error because it focuses on what a defendant can do to

obtain his right of confrontation instead of focusing on how the state chooses to meet its burden of proof in a criminal case. The question is the propriety of allowing the state to meet its burden of proof by out-of-court statements without calling the available declarant. The court's rule unconstitutionally shifts the burden to the defendant, by forcing him to call the witness or to expressly request the state to call the witness.

The prospective rule and the rule in petitioner's case deprive the accused of his constitutional right to have the state present witnesses against him, to be presumed innocent, and to have no burden of proof whatsoever.

The Minnesota ruling confuses the protection of the compulsory process clause, which gives the accused the right

to compel attendance at trial of witness in his favor, with confrontation and cross-examination. The former does not allow the state to abdicate its burden of proof or justify its shift to the defendant.

These questions are clearly very important constitutional questions of far-reaching application and impact, which this Court, not the lower courts of this country, should decide. These questions are also ones which will keep recurring until decided by this Court.

The decision of the Minnesota Supreme Court establishes a dangerous precedent which, if not corrected, sounds the death knell for the right of confrontation in criminal cases. The decision in a child sex prosecution may be applied to many other types of prosecutions and evidentiary situations. Courts in Minnesota and

elsewhere would be free to decide that the Confrontation Clause does not require adult victims of rape, elderly victims of any crime, or any reluctant witnesses to testify and allow the state to prosecute simply on the basis of out-of-court statements to police and others.

Many, if not most, prosecutions rely on victim/witness testimony. If the ruling of the Minnesota Supreme Court is allowed to stand, the most fundamental rule of law and our criminal justice system, the right of the defendant to confront his accusers, will become meaningless. This ominous note was sounded by the dissenting justice on the Minnesota Supreme Court who noted:

> I would hold that if the state wishes to establish the crime by victim testimony, which is almost always the case in this type of prosecution, it must do so by producing the alleged victim on the witness stand in open court so the accused may be afforded

his constitutional right of confrontation. Appendix A 27.

The far reaching application of the court's ruling, to virtually any and all prosecutions involving victim/witness testimony, demonstrates the many situations in which the issue is likely to recur unless this Court decides this question. In addition, since the statements were admitted under the residual exception, and not a unique Minnesota law, the decision could be adopted by any of the many states whose rules of evidence, like Minnesota's, are based on the uniform rules.

This case also presents this Court with the opportunity to resolve what has been a highly litigated area in recent years. In addition to the number of situations in which out-of-court statements are being offered at trial, state legislatures are continually passing new

laws attempting to make out-of-court statements admissible in even more situations. This pattern can be expected to continue until this Court steps in and again clarifies the law on these issues.

The constitutional ramifications of a decision on unavailability are even broader than those surrounding reliability, which must be decided on a case by case basis. A wholesale departure from existing practice is made by the holding that unavailability is no longer required for admission of hearsay statements under the residual exception.

These issues also raise questions about the fairness of a procedure which allows the state to present its case on the basis of out-of-court statements, without the declarant appearing, testifying, and being cross-examined before the jury.

Where the accused is facing a 10 or 20 year prison term--or longer, and witness is available, it is not at all clear what state interest outweighs the right to confrontation. Discarding the fundamental requirement of unavailability abrogates the fundamental protection and significance of the right to confrontation.

The additional question of whether a witness is constitutionally available, merely because the defendant could call the witness to testify at trial or by forcing the defendant to expressly request the state to call the witness, is also a very important one and again one which will recur. This Court should decide whether such a rule is ever permissible, and, if so, when and under what circumstances is it available.

This case presents an opportunity for

this Court to resolve any misinterpretation of, or conflict between, its decisions in Ohio v. Roberts and United States v. Inadi and to answer the questions which were not raised in Idaho v. Wright.

This Court has the opportunity to clarify the protection of the Confrontation Clause as applied in a typical criminal prosecutions and to reaffirm the fundamental principles of confrontation in the face of ever narrowing interpretation by state courts and legislatures.

C. THE MINNESOTA SUPREME COURT RULING IS IN CONFLICT WITH IDAHO V. WRIGHT ON THE CONFRONTATION CLAUSE REQUIREMENT OF RELIABILITY OF OUT-OF-COURT STATEMENTS AND ALTERNATIVELY THIS CASE SHOULD BE REMANDED FOR RECONSIDERATION

In Lee v. Illinois, 476 U.S. 530, 543

(1986), this Court held that hearsay evidence which does not fall into "a firmly rooted hearsay exception" is presumptively unreliable and constitutionally inadmissible unless it is supported by a "showing of particularized guarantees of trustworthiness."

In Idaho v. Wright, supra at 5040, this Court held that this constitutionally required showing of "particularized guarantees of trustworthiness" must be made from the "totality of the circumstances" which surround the making of the statement and render the declarant particularly worthy of belief. This Court stated:

> . . . (U)nless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court

statement.

This Court rejected a number of factors which do not address the circumstances surrounding the making of the statement.

The Minnesota Supreme Court, without any analysis whatsoever, concluded that the out-of-court statements met the requirement of the residual exception that the statements have "equivalent circumstantial guarantees of trustworthiness" as the other exceptions to the hearsay rule. Appendix A 18-21. The Minnesota Supreme Court, however, did not make a finding as to what that standard required or, more importantly, that this evidentiary standard also met the Confrontation Clause requirements.

In light of this Court's decision in Idaho v. Wright, it is clear that the Confrontation Clause requirements of

reliability, and not the standard of the residual hearsay exception, control the question of admissibility of the out-of-court statements. It is also clear now that the constitutional test requires an affirmative showing that the circumstances surrounding the making of the statement render the declarant particularly worthy of belief.

Since the decision of the Minnesota Supreme Court did not address these issues, it is in conflict with the decision in Idaho v. Wright. If this Court does not grant review of this case for the reasons stated earlier, this case should be remanded for reconsideration in light of that decision.

VII.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Minnesota Supreme Court in this matter.

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

C2-88-2379

Court of Appeals — Coyne, J.
Dissenting, Kelley, J.

State of Minnesota,

Respondent,

vs.

Bruce Philip Larson,

Appellant.

Filed March 23, 1990
Office of Appellate
Courts

S Y L L A B U S

1. Trial court did not violate defendant's right of confrontation in admitting extrajudicial statements of available but nontestifying complainant in child sex abuse prosecution where defendant was free to call and cross-examine the child.

2. Although extrajudicial statements may not have been admissible under Minn.

Aff. A P. 1

Stat. § 595.02, subd. 3(1988), because the declarant was available but did not testify, the statements were admissible under Minn. R. Evid. 803(24)(the catch-all exception) and Minn. R. Evid. 803(4)(statements for purpose of medical diagnosis or treatment).

3. In the future in a case like this the state must call in its case-in-chief an available witness whose hearsay statements are being admitted against the defendant if the defendant so requests.

4. Effect of determination of competency of child witness is not a factor which trial court necessarily must consider in making competency determination.

Reversed; judgment of conviction affirmed.

Considered and decided by the court en banc without oral argument.

AM. A P. 2

O P I N I O N

COYNE, Justice.

In its decision in this case the court of appeals concluded that the trial court erred in admitting certain extrajudicial statements made by an available but nontestifying complainant in a child sex abuse prosecution. State v. Larson, 447 N.W.2d 593, 597 (Minn. App. 1989). The court of appeals ruled that the error was prejudicial error, assuming that the complainant was competent, as the trial court determined, and therefore available. Id. at 598-99. The court ruled, however, that the trial court may not have realized the effect of its determination that the child was competent, and it remanded with instructions that if the trial court on remand changed its competency determination based on its awareness of the effect of the determination, then a new trial would not

be needed. Id. One member of the panel, arguing that a new trial was required, dissented from the remand for a reconsideration of the issue of competency. Id. at 600. We granted both the defendant's petition for review and the cross-petition for review filed by the state. Having concluded that the trial court did not err in admitting the hearsay statements of the child, we reverse the decision of the court of appeals and affirm the judgment of conviction.

The child in this case, B., was born in May of 1983. On separating from defendant, B.'s mother was awarded custody of B., subject to defendant's visitation privileges. In late April 1987, when she was not quite four years old, the child complained to her mother of vaginal soreness and burning urination. Her mother took her to a family practice clinic. The

physician's assistant, who conducted the examination, saw redness and swelling around the vaginal opening. Suspecting abuse, the examiner asked B. who had touched her. B. replied "Daddy" had touched her with "his bone" that "came out of his pants." B. said it had hurt and that she had asked him to stop.

Visits were temporarily discontinued pursuant to a court order obtained May 2, 1987, in the district court in the county where defendant resides.

On May 7, 1987, B. made more statements about the abuse to a child protection specialist. She said "someone" had put his penis "between her legs and up her butt." SHe would not say who the "someone" was because "she loved her Daddy and she didn't want him to get into trouble." She said the abuse happened "in her Daddy's house."

Defendant retained an attorney and obtained a court order in June allowing supervised visits.

B. was evaluated psychologically by a doctor, who talked with her four times. He concluded that there was a "high probability" that she had been involved in "inappropriate sexual activity."

On July 31, 1987, after a hearing, the court ordered reinstatement of defendant's unsupervised visitation privileges.

B. began weekly psychotherapy with Dr. Susan Lund of Midwest Children's Resource Center in August. On October 22, 1987, B. told Dr. Lund that defendant "pushed at her with his penis." She demonstrated this with anatomically correct dolls and said it happened during the recently reinstated unsupervised visits.

Hennepin County, the county of the mother's residence, obtained an order

assuming custody of B. and her younger brother and terminating defendant's visitation privileges. More people interviewed B. in November and this prosecution was commenced in December of 1987.

The omnibus hearing was held in the district court in the county where the charged abuse occurred in June of 1988 shortly before trial was to begin. The hearing was held on the state's motion for permission to use the out-of-court statements of the complainant and on the defendant's motion to suppress the statements on the ground that their admission would violate defendant's constitutional right of confrontation. The parties stipulated, but only for the purposes of the hearing, that B., then five, was incompetent to testify. The trial court ruled that the statements were

admissible under Minn. Stat. § 595.02, subd. 3(1988).[1] As the statute is worded, the statements cannot be admitted pursuant to the statute unless the child either (a) testifies at trial or (b) is unavailable and there is corroborating evidence. After ruling as it did, the trial court granted a continuance to the defendant so that the defense could try to obtain expert testimony and also so that defendant could decide whether to call B, to testify.

Defendant renewed his motion at the reconvened omnibus hearing in August, shortly before the rescheduled trial date. In support, he cited Coy v. Iowa, 487 U.S. 1012 (1988). The trial court correctly ruled that Coy did not apply. In the order

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[1] Although the trial court had ruled that B's videotaped statement made in November 1987 was inadmissible, at trial the videotape was admitted into evidence and shown to the jury pursuant to the parties' stipulation.

the trial court said that admissibility of the statements was conditioned on the unavailability of the victim.

On August 30, the first day of trial, defense counsel made a continuing objection to the out-of-court statements on the ground that their admission in evidence would violate defendant's right of confrontation. The trial court said defendant would have to make an additional objection if another ground developed. Defendant also said he intended to call B. The trial court therefore conducted an in-chambers competency hearing. The court said, "It is understood that neither party -- if the court finds [B.] is competent * * * has to call her if (that party doesn't) wish to do so." The trial court subsequently determined that B. was competent. Defendant did not call B. When the state introduced B.'s statements,

defendant made a continuing objection on hearsay grounds.

The jury found defendant guilty of criminal sexual conduct in the second degree.

The court of appeals, in concluding that the trial court erred in admitting the hearsay statements of the child, ruled (1) that the trial court's determination that the victim was competent meant that she was available, which in turn meant that both the statute and the constitution precluded use of the victim's out-of-court statements unless the state called her as a witness; (2) that Minn. Stat. § 595.02, subd. 3 deprives the courts of authority to admit out-of-court statements of child sex abuse victims pursuant to Minn. R. Evid. 803(24), the so-called catch-all exception; and (3) that Minn. R. Evid. 803(4), dealing with the admission of statements made for the

purpose of medical diagnosis or treatment, does not afford a basis for admitting a victim's statement as to the identity of her abuser. We disagree with all of these conclusions and the reasoning underlying them.

First, the Constitution does not preclude the use of the victim's out-of-court statements unless the state has called her as a witness. In State v. Koonsman, 281 N.W.2d 487, 490 (Minn. 1979), we rejected a defendant's contention that he was denied his right of confrontation by the state's failure to call the victims to testify at the omnibus hearing on the issue of the admissibility of identification testimony. We stated:

> We have rejected similar arguments before--see, e.g., State v. Maloney, 295 Minn. 262, 204 N.W.2d 202 (1973),--and we do so again. The objectives of the confrontation clause and the compulsory-process clause are to assist the defendant in securing

> the presence of witnesses and to enable the defendant to examine witnesses whose statements are used against him at trial. Westen, Confrontation and Compulsory Process, 91 Harv. L. Rev. 567, 616. Stated differently, confrontation and compulsory process "work in tandem toward a common goal of assisting the defendant in producing and examining witnesses at trial." Ibid., p. 622. In any event, even if it could be said that the prosecutor breached some duty to call the victims, defendant should not be able to claim that the interests served by confrontation and compulsory process were not served in this case because he had the right to call the victims at the hearing. Any other rule would permit a defendant to challenge his conviction in bad faith by pointing to the prosecutor's failure to call a witness whom defendant by his own action demonstrated he had no desire to examine.

Id.

Subsequently, in United States v. Inadi, 475 U.S. 387, 394 (1986), the United States Supreme Court ruled that the confrontation clause does not normally require a showing that the declarant is

unavailable in order to admit out-of-court statements. The out-of-court statements in Inadi were made by nontestifying but available con-conspirators of the defendant. The Court said that the unavailability rule was developed in cases involving testimony given in an earlier trial, where there is good reason for such a rule, but that the rule does not apply to many kinds of hearsay admitted in criminal trials. Id. at 392-94. Recognizing that it would impose a significant practical burden on the prosecutor to insure the availability of declarants even when neither the prosecutor nor the defense wished to examine the declarant at trial, the Court rejected an unavailability rule:

> Any marginal protection to the defendant by forcing the government to call as witnesses those co-conspirator declarant who are available, willing to testify, hostile to the defense, and yet not already subpoenaed by the prosecution, when the

> defendant himself can call and cross-examine such declarant, cannot support an unavailability rule. We hold today that the Confrontation Clause does not embody such a rule.

Id. at 399-400.[2]

The same reasoning applies here. As in Inadi, it is not at all clear that it was in the interests of the defendant that the declarant be called by either side. It may well have been better for the defendant

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[2]In a footnote the Court also said:

> It is not clear from the Court of Appeals' opinion whether in order to meet its burden of showing unavailability, the prosecution would be required to call the declarant as a witness, or only to insure that the declarant is available for testimony if needed. The unavailability rule suffers from many of the same flaws under either interpretation, and in fact may be even less defensible under an interpretation requiring the prosecution to call each declarant as a witness.

475 U.S. at 398 n. 10.

to go to the jury and challenge the ambiguity of the child's statements (when she said that the abuse occurred in defendant's house but would not say who did it) than to have the child called and possibly testify in court that it was the defendant who did it. Given the circumstances of this case, the Inadi approach makes sense to us, at least with respect to any constitutional claim.

Read literally, section 595.02, subdivision 3, recognizes the admissibility of a child's out-of-court statements only if the child either testifies or is unavailable as a witness. The legislature enacted the statute in 1984, two years before the United States Supreme Court made it clear in Inadi that the unavailability of the declarant is not prerequisite to admissibility of hearsay evidence against the defendant in a criminal case.

Understandably, since the question had not yet been resolved, the legislature took the safe constitutional course and codified what it understood the confrontation clause of the sixth amendment required in order to make out-of-court statements admissible.

It may well be that in applying the statue as a matter of comity,[3] we could construe the statute as not requiring the state to call a child declarant who is

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[3]the court has the primary responsibility under the separation of powers doctrine for the regulation of evidentiary matters but has enforced reasonable statutory rules of evidence as a matter of comity where the rules were not in conflict with the Minnesota Rules of Evidence. State v. Dana, 422 N.W.2d 246, 259 (Minn. 1988); State v. Willis, 332 N.W.2d 180, 184 (MInn. 1984). We disagree with dictum contained in opinions of the court of appeals deferring to the legislature as the primary regulator of evidentiary matters. E.g., In re Proposed Suspension, Revocation or Non-Renewal of the Nursing Home Licenses of Parkway Manor Healthcare Center and Innsbruck Healthcare Center, 448 N.W.2d 116, 120-21 (Minn. App. 1989), pet. for rev. denied (Minn., January 18, 1990).

available, at least where, as here, the defendant has not requested the state to call the child but has expressed his intention to call the child to testify. However, we see no need to rely on the statute to sustain the admission of the statements in this case.

By enacting section 595.02, subdivision 3, the legislature did not deprive the court of authority to admit extrajudicial statements of child complainants or witnesses pursuant to any court promulgated rule of evidence. As we have already noted, supra at n. 3, we have the primary responsibility under the separation of powers doctrine for the regulation of evidentiary matters. Moreover, there is no reason to believe that the legislature was attempting to preempt the field. Indeed, the statute expressly authorizes the admission of

certain out-of-court statements "not otherwise admissible by statute or rule of evidence," signifying an intention only to supplement the rules of evidence.[4] Here the out-of-court statements were admissible under two different rules of evidence, Minn. R. Evid. 803(24) and 803(4).

Minn. R. Evid. 803(24), one of the two so-called "catch-all" exceptions to the

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[4]In State v. Bellotti, 383 N.W.2d 308, 313 (Minn. App. 1989), pet. for rev. denied (Minn. April 24, 1986), the court of appeals upheld the admission of certain out-of-court statements pursuant to Minn. R. Evid. 803(24), where those statements were deemed inadmissible under the statute. We have since rejected, in State v. Dana, 422 N.W.2d 246, 250 (Minn. 1988), the conclusion of the court of appeals in Bellotti that the statements by one child about assaults on another child are inadmissible under the statute, but we have not rejected the conclusion that statements inadmissible under the statute may be admitted under one of our Minnesota Rules of Evidence.

hearsay rule,[5] provides that a hearsay statement may be admitted even if not admissible under any of the other exceptions to the hearsay rule if the statement has "equivalent circumstantial guarantees of trustworthiness" and certain other conditions are met.[6] Relevant cases

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[5]The other is Minn. R. Evid. 804(b)(5). As the 1977 committee comment makes clear, but for the requirement of unavailability in rule 804(5), this exception is identical to rule 803(24).

[6]The rule provides that, even though the declarant is available as a witness, a statement not specifically covered by any of the other hearsay exceptions but having "equivalent circumstantial guarantees of trustworthiness" is admissible:

> [I]f the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement

of this court relying on rule 803(24) include State v. Ortlepp, 363 N.W.2d 39, 44 (Minn. 1985) (ruling admissible accomplice's prior statement as substantive evidence under the rule and citing other cases involving the catch-all exceptions). We are satisfied that the out-of-court statements by the victim in this case had sufficient circumstantial guarantees of trustworthiness to justify their admission under this rule. United States v. Shaw, 824 F.2d 601, 610 (8th Cir. 1987)(trial court did not abuse its discretion in admitting, under identical federal version

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> may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name, address, and present whereabouts of the declarant.

of this rule, testimony by social worker about interview with 11-year-old victim of sexual abuse by foster father where strong circumstantial guarantees of trustworthiness were present), cert. denied, 484 U.S. 1068 (1988).

Similarly, the statements made for the purpose of medical diagnosis or treatment are independently admissible under Minn. R. Evid. 803(4).[7] Citing State v. Dana, 422 N.W.2d 246 (Minn. 1988), the court of appeals held that the trial court may not

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[7]Rule 803(4) provides that statements made for purposes of medical diagnosis or treatment are not excluded by the hearsay rule even though the declarant is available as a witness. Statements covered by the rule are:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

rely on this rule to admit statements identifying the abuser. In Dana, however, we were not concerned with the admissibility of a patient's statements made for purposes of medical diagnosis or treatment [the type of statement covered by rule 803(4)] but rather with the admissibility of expert opinion testimony going to the identity of the child abuser. Dana, 422 N.W.2d at 250. In a number of cases, the Eighth Circuit of the United States Court of Appeals has upheld the admission under Fed. R. Evid. 803(4) of the victim's statement identifying the abuser on the theory that the identity of the abuser is pertinent to treatment. See, e.g., United States v. DeNoyer, 811 F.2d 436, 438 (8th Cir. 1987)(the nature and extent of psychological problems which ensue and the nature of the treatment depend often on knowing the identity of the

abuse); see also, Golden v. State, 674 P.2d 721, 725 (Wyo. 1983), cert. denied, 467 U.S. 1253 (1984). We agree with the reasoning of these cases on this particular point.

We recognize, however, that a defendant who wants to cross-examine an available child witness whose extrajudicial statements are being used by the state should not be compelled to call the child as a witness if the defendant would prefer that the state call the witness. Therefore, using a modified version of the approach suggested by Professor Westen,[8] we hold that in future cases of this kind the state must, when expressly requested by the defendant to do so, call in its case-in-chief an available witness whose hearsay

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[8] See Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 617-18 (1978).

statements are being admitted against the defendant.

Since we have concluded that the trial court did not err in admitting the extrajudicial statements of the child complainant, there is no need to decide whether the court of appeals erred in ruling that the effect of the determination of the competency of a child witness is a factor to be considered in making that determination. Inasmuch as the availability of the witness is not determinative of the admissibility of extrajudicial statements, the problem which prompted the court of appeals' ruling should not recur. Moreover, relevant cases of this court do not suggest that the effect of the competency determination on the trial of the case is a factor which should be considered in deciding competency. Cf. State v. Amos, 347 N.W.2d

498, 501 (Minn. 1984); State v. Yanke, 336 N.W.2d 299, 300 (Minn. 1983).

In summary, we hold that the extrajudicial statements of the child complainant who was available to both prosecution and defendant but called by neither to testify were properly admitted. Accordingly, we reverse the decision of the court of appeals and affirm the defendant's conviction.

Reversed; judgment of conviction affirmed.

KELLEY, Justice (dissenting):

I respectfully dissent. At all steps of this criminal prosecution the defendant duly objected to the admission of out of court statements of the alleged victim on the grounds that since the testimony of the victim was crucial to the establishment of the elements of the crime charged, the state had the obligation to produce the victim in court for examination and cross-examination under the Sixth Amendment to the United States Constitution and Article I, Section Six of the Minnesota Constitution, each of which provides that the "accused shall enjoy the right * * * to be confronted with the witnesses against him." Any statute or court-promulgated rule of evidence, or any concern for "practical problems of prosecutors," in my view, cannot dilute that constitutional

mandate. Moreover, admission of evidence in violation of the confrontation clause is seldom, if ever, harmless. State v. Hansen, 312 N.W.2d 96, 102-105 (Minn. 1981). I would hold that if the state wishes to establish the crime by victim testimony, which is almost always the case in this type of prosecution, it must do so by producing the alleged victim on the witness stand in open court so the accused may be afforded his constitutional right of confrontation.

Consequently I would remand to the trial court for a new trial.

STATE OF MINNESOTA

IN SUPREME COURT

C2-88-2379

State of Minnesota,

Respondent,

vs.

Bruce Philip Larson,

Appellant.

Office of Appellate Courts

FILED
May 15, 1990

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition for rehearing filed on behalf of appellant Bruce Philip Larson be and the same is hereby denied. A new Page 7, attached, is hereby substituted for the original page 7 of the slip opinion filed on March 23, 1990.

Dated: May 15, 1990

BY THE COURT:

/s/ M. Jeanne Coyne
Associate Justice

App. B p. 1

The same reasoning applies here. As in Inadi, it is not at all clear that it was in the interests of the defendant that the declarant be called by either side. It may well have been better for the defendant to go to the jury and challenge the ambiguity of the child's statements (when she said that the abuse occurred in defendant's house but would not say who did it) than to have the child called and possibly testify in court that it was the defendant who did it. Given the circumstances of this case, the Inadi approach makes sense to us, at least with respect to any constitutional claim.

Read literally, section 595.02, subdivision 3, recognizes the admissibility of a child's out-of-court statements only if the child either testifies or is unavailable as a witness. The legislature enacted the statute in 1984, two years

before the United States Supreme Court made it clear in Inadi that the unavailability of the declarant is not always prerequisite to admissibility of hearsay evidence against the defendant in a criminal case. Understandably, since the question had not yet been resolved, the legislature took the safe constitutional course and codified what it understood the confrontation clause of the sixth amendment required in order to make out-of-court statements admissible.

It may well be that in applying the statue as a matter of comity,3 we could construe the statute as not requiring the state to call a child declarant who is available,

(footnote 2 continued)

defensible under an interpretation requiring the prosecution to call each declarant as a witness.

475 U.S. at 398 n. 10.

3 The court has the primary responsibility under the separation of powers doctrine for the regulation of evidentiary matters but has enforced reasonable statutory rules of evidence as a matter of comity where the rules were not in conflict with the Minnesota Rules of Evidence. State v. Dana, 422 N.W.2d 246, 259 (Minn. 1988); State v. Willis, 332 N.W.2d 180, 184 (MInn. 1984). We disagree with dictum contained in opinions of the court of appeals deferring to the legislature as the primary regulator of evidentiary matters. E.g., In re Proposed Suspension, Revocation or Non-Renewal of the Nursing Home Licenses of Parkway Manor Healthcare Center and Innsbruck Healthcare Center, 448 N.W.2d 116, 120-21 (Minn. App. 1989), pet. for rev. denied (Minn., January 18, 1990).

STATE OF MINNESOTA

IN COURT OF APPEALS

C2-88-2379

Martin County

Randall, Judge

Huspeni, Judge
Dissenting,

State of Minnesota,
Respondent,

Hubert H.Humphrey,III
Attorney General
Paul R. Kempainen
Asst. Atty General
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117 University Avenue
St. Paul, MN 55155

D. Gerald Wilhelm
Martin County Atty
Martin Co. Courthouse
Fairmont, MN 56031

vs.

Bruce Phillip Larson,
Appellant.

C. Paul Jones
State Public Defender
Michael F. Cromett
Asst. State Public
Defender
1708 American Nat'l
Bank Building
St. Paul, MN 55101

Filed:
October 24, 1989
Office of Appellate
Courts

APPENDIX C P. 1

S Y L L A B U S

1. While objections were not made at trial, they were made at the omnibus hearings; therefore, appellant may raise the issue of the trial court's admission of out-of-court statements of a child witness under Minn. Stat. § 595.02, subd. 3, where the child witness neither testifies nor is unavailable to testify.

2. Admission of out-of-court statements of a child witness under Minn. Stat. § 595.02, subd. 3, where the child witness neither testifies nor is unavailable to testify, is error.

3. State's duty under Minn. Stat. § 595.02, subd. 3 regarding "production" of a child witness who is required to testify in order to make that child witness's out-of-court statements admissible is not

O P I N I O N

HUSPENI, Judge

After a jury trial, appellant was found guilty of second degree criminal sexual conduct involving his daughter. Appellant alleges that he was convicted based on the trial court's improper admission of his daughter's out-of-court statements and insufficient evidence. We remand.

FACTS

Following marriage dissolution proceedings, appellants three-year-old daughter B.L.L. remained in her mother's custody subject to visitation by appellant. In late April, 1987, B.L.L. complained to her mother of being sore. B.L.L. was taken to a clinic where a medical assistant tested and visually inspected B.L.L. The inspection revealed genital swelling and "redness." Upon questioning of B.L.L. by

the medical assistant, B.L.L. stated that appellant had touched her genitals with his own on more than one occasion and that appellant had put B.L.L. on his couch and rubbed her stomach until the skin peeled.

Subsequently, a child protection specialist who interviewed B.L.L. was told that somebody had abused her in her father's living room. B.L.L. indicated this had happened more than once. Also, a psychologist hired by appellant to evaluate B.L.L. indicated there was a "high probability" B.L.L. had been abused, but the psychologist did not identify the alleged abuser.

In August, 1987, B.L.L. began weekly therapy with another psychologist. In late October, B.L.L. indicated she had been abused in her father's bedroom. A late November interview of B.L.L. by a police officer, a child protection specialist and

B.L.L.'s mother was videotaped. It included allegations of abuse and demonstrations thereof with anatomically correct dolls. Three weeks later, appellant was charged with criminal sexual conduct.

In mid-June, 1988, after an omnibus hearing at which the parties stipulated that B.L.L. was incompetent to testify, the trial court denied appellant's motion to suppress B.L.L.'s out-of-court statements with the exception of the videotape, on which the trial court reserved judgment. In making its determination, the court noted the parties' stipulation regarding competency and granted appellant's motion for a partial continuance based on the state's indication that it did not intend to call the then five-year-old B.L.L. at trial.

After the remainder of the omnibus

hearing in late August, the trial court ruled the videotape inadmissible. Appellant then obtained permission to admit the videotape. He also sought and was granted a determination that B.L.L. was competent to testify because he was thinking of calling her as a witness. At trial B.L.L.'s out-of-court statements were presented and the videotape was shown to the jury, but neither party called B.L.L. to testify. A jury found appellant guilty of a single act of second degree criminal sexual conduct.

ISSUES

1. Did the trial court err in admitting B.L.L.'s out-of-court statements?

2. Is the evidence sufficient to sustain appellant's conviction?

3. Was appellant denied a fair trial by the trial court's refusal to honor appellant's challenge of a juror for cause?

ANALYSIS

I.

In Minnesota,

> [a]n out-of-court statement made by a child under the age of ten years * * * alleging, explaining, denying or describing any act of sexual contact or penetration performed with or on the child or any act of physical abuse of the child * * * by another, not otherwise admissible by statute or rule of evidence, is admissible as substantive evidence if:
>
> * * *
>
> (b) the child * * * either:
>
> (i) testifies at the proceedings; or
>
> (ii) is unavailable as a witness and there is corroborative evidence of the act; * * *

Minn. Stat. § 595.02, subd. 3(b) (1988). Appellant claims that the admission of B.L.L.'s out-of-court statements when B.L.L. was available to testify, but did not do so, violated his right to confrontation and deprived him of due

process of law.

Regarding B.L.L.'s failure to testify after being determined competent to do so, we note, first, that when the trial court made its determination, the state failed to move for a continuance to integrate into its case the testimony of B.L.L. required under Minn. Stat. § 595.02, subd. 3(b)(i) for B.L.L.'s out-of-court statements to be admitted and, second, that the state subsequently failed to have B.L.L. testify. These events indicate that the state was not completely aware that the trial court's competency ruling implied that if B.L.L. did not testify, her out-of-court statements could not be properly admitted. Additionally, we note the trial court's statement regarding B.L.L.'s competency determination:

> Of course, it is understood that neither party -- if the court finds [B.L.L.] is competent, neither party has to call her if

they don't wish to do so.

Thus, it appears that the import of the ruling that B.L.L. was competent to testify was not fully explored by the trial court either.

A. RIGHT TO CONFRONTATION

> The Sixth Amendment's Confrontation Clause, made applicable to the States through the Fourteenth Amendment provides: "in all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him."

Ohio v. Roberts, 448 U.S. 56, 62-63, 100 S.Ct. 2531, 2537 (1980) (citations omitted); see also State v. Conklin, NO. C5-88-545, slip op. at 6 (Minn. August 15, 1989). However,

> the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing

interest be closely examined. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S.Ct. 1038, 1046 (1973) (internal citations omitted, quoting Berger v. California, 393 U.S. 314, 315, 89 S.Ct. 540, 541 (1969)). Before trial, appellant moved for

> an [o]rder denying the admissibility of the out of court statements of the alleged victim because the admissibility of the statements would violate [appellant's] constitutional right of confrontation in light of the fact that [the state] does not intend to call the alleged victim, [B.L.L.] as a witness because he believes she is incompetent.

Also, denial of appellant's right to confrontation was argued at both omnibus hearings. Therefore, given the constitutional aspects of the issue and despite the fact that appellant did not directly address the confrontation issue for a third time at trial, we believe the issue sufficiently preserved to be

App. C P. 10

addressed on appeal. See State v. Cash, 391 N.W.2d 875, 880 (Minn. Ct. App. 1986)(where defendant's objection at omnibus hearing to admission of evidence was sustained but defendant failed to object at trial when the evidence was nevertheless introduced, issue of admissibility of the evidence sufficiently preserved for appeal); State v. Marty, 376 N.W.2d 515, 517 (Minn. Ct. App. 1985), pet. for rev. denied (Minn. Jan. 17, 1986) (evidentiary issue properly before this court where defendant objected at state's first unsuccessful attempt to enter evidence but not a later successful attempt).

The state argues that B.L.L. was actually unavailable to testify because of "the State's undisguised intention to proceed without ever calling her due to her tender age." This argument on appeal

reinforces our concern that neither the prosecutor nor the trial court fully considered how the determination that B.L.L. was competent affected the admissibility of her out-of-court statements which section 595.02, subd. 3(b). We are unable to discern the basis for B.L.L.'s continued unavailability if, in fact, she was appropriately declared competent to testify.

The state also argues that B.L.L. was unavailable to testify because of the stipulation. We cannot agree. As articulated by the prosecutor at the first omnibus hearing, the parties' stipulation was:

> For the purpose of this hearing only the state is claiming and I believe the defense will agree * * * that the issue of incompetency of the witness which is one of the requirements to be shown in order to admit out-of-court testimony is admitted. The issue before the court * * * is the reliability of the facts and

> circumstances surrounding the taking of the statements * * *

(Emphasis added). The limited nature of the parties' stipulation is highlighted by the resulting court order stating:

> That for purposes of this hearing the parties have assumed that the child victim, who is under 10 years of age, is incompetent to testify in the trial.

Additionally, this interpretation of the stipulation is consistent with that of defense counsel who, at the second omnibus hearing, stated:

> I have stipulated for the purpose of [the first omnibus hearing] and the matter for which we are here on the statute that the child is incompetent, both are left open to say the child is competent for testifying so arguably both of us would bring the child here, me by subpoena and him with or without. There could have to be a competency hearing and only this court would decide whether the child could testify.

(Emphasis added). Finally, after the second omnibus hearing, the trial court

ruled that

> assuming the unavailability of the victim, the [appellant's] motion to suppress * * * out of court statements * * * is denied.

(Emphasis added). In the fact of such a record, we cannot conclude that the parties' stipulation was for anything other than the omnibus hearings. As such, the stipulation did not extend to trial.

Alternatively, the state argues that because "the Confrontation Clause only guarantees an opportunity for effective cross examination * * *," Pennsylvania v. Ritchie, 480 U.S. 39, 51, 107 S.Ct. 989, 999 (1987) (quoting Delaware v. Fensterer, 474 U.S. 15, 20, 106 S.Ct. 292, 294 (1985)(emphasis original)) and because B.L.L. was present and available to testify if appellant called her, the state satisfied its duty of "producing" B.L.L. under Roberts. The state's argument regarding production of B.L.L. has

superficial appeal, especially in view of the fact that appellant himself sought the determination of competency and had indicated that he might wish to call B.L.L. as a witness. It may be argued that appellant, by his actions, has divested himself of any right to complain that the state must call this competent witness.

However, we believe if B.L.L. were available, her out-of-court statements could be admitted only if she testified. The obligation to assure presentation of that testimony is on the state. Only by complying with the requirements of Minn. Stat. § 595.02, subd. 3(b) could the state properly fulfill its duty to "prove every ingredient of an offense beyond a reasonable doubt." Patterson v. New York, 432 U.S. 197, 215, 97 S.Ct. 2319, 2329 (1977). If appellant were required to call B.L.L. in his case in order to cross-

examine her, he would discharge the state's burden of meeting the requirements of Minn. Stat. § 595.02 and, in a very real sense, strengthen and further the case against himself. Appellant cannot be placed in a position whereby his election to exercise his constitutional right of cross-examination forces him to waive his right to have the state call its "available" witness(es) against him. See Lowrey v. State, 757 S.W.2d 358 (Tex. Cr. App. 1988); Long v. State, 742 S.W.2d 302 (Tex. Cr. App. 1987).[1]

B. RESIDUAL EXCEPTION 803(24)

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[1]Appellant alleges that denial of his confrontation clause rights also denies him due process. Logically, if due process requires a fair trial, State v. Wofford, 262 Minn. 112, 120, 114 N.W.2d 267, 273 (1962), and a fair trial requires the rights of confrontation and cross-examination, Lee v. Illinois, 476 U.S. 530, 540, 106 S.Ct. 2056, 2061-62 (1986), the denial of appellant's sixth amendment rights also denied him a fair trial and hence due process.

The state argues that even if B.L.L.'s out-of-court statements were not admissible under the statue, they were admissible under Minn. R. Evid. 803(24)'s residual exception to the hearsay rule. We disagree.[2] To allow admission of the evidence in question under Minn. R. Evid. 803(24) would allow the state to circumvent the legislature's explicit directive that such evidence is admissible only if the victim either testifies or is unavailable to do so. The rule was not enacted for

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[2]Our analysis assumes that Minn. R. Evid. 803(24) is applicable to the instant case. The comment to the rule states that "[Rule 803(24)] defines the common law power of the judge to fashion new exceptions to the hearsay doctrine." (Emphasis added.) Minn. Stat. 595.02, subd. 3 "is a legislative enactment of an exception to the hearsay rule." State v. Carver, 380 N.W.2d 821, 825 (Minn. Ct. App. 1986), pet. for rev. denied (Minn. March 27, 1986). Arguably, an exception to the hearsay rule involving circumstances already covered by the statute may not be "new" and therefore not be covered by this exception to the hearsay rule.

this type of evidentiary arbitrage and to allow it would effectively moot the statute's alternative requirements. See State v. Campbell, 229 Or. 633, 640, 705 P.2d 694, 699 (1985) ("Because the legislature specifically restricted hearsay evidence of sexual misconduct, the trial [court] erred in admitting the hearsay testimony under the 'catch all' exception [to the hearsay rule] * * *).

II.

The state claims that even if the out-of-court statements were improperly admitted, the remaining evidence was sufficient to convict appellant. In reviewing a sufficiency of the evidence claim, an appellate court must determine

> whether, given the facts in the record and the legitimate inferences that can be drawn from those facts, a jury could reasonably conclude that the defendant was guilty of the offense charged * * *. [An appellate court] must take the

> view of the evidence most favorable to the state and assume the jury believed the state's witnesses and disbelieved any contradictory evidence. * * * If the jury, giving due regard to the presumption of innocence and to the state's burden of proving the defendant's guilt beyond a reasonable doubt, could reasonably have found the defendant guilty, that verdict will not be reversed.

State v. Merrill, 274 N.W.2d 99, 111 (Minn. 1978) (citations omitted). "Evidence admitted in violation of the confrontation clause is not harmless error unless the evidence in other respects is overwhelming." State v. Hansen, 312 N.W.2d 96, 105 (Minn. 1981).

Because appellant was denied his right to confront B.L.L.,

> [a]n assessment of harmlessness cannot include consideration of whether the witness's testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the

remaining evidence.

Coy v. Iowa, ___ U.S. ___, ___, 108 S.Ct. 2798, 2803 (1988). Here the parties agree that if requirements of Minn. Stat. 595.02, subd. 3(b) are not met, the only admissible evidence is B.L.L.'s statements to the medical assistant which are admissible as statements made for the purpose of medical diagnosis, see Minn. R. Evid. 803(4). While B.L.L.'s statements to the medical assistant named appellant as the perpetrator,

> [s]uch statements regarding who caused [the] injuries generally are not admissible because they are irrelevant to medical diagnosis and treatment.

State v. Bellotti, 383 N.W.2d 308, 312 (Minn. Ct. App. 1986), pet. for rev. denied (Minn. April 24, 1986) (citation omitted).

In State v. Dana, 422 N.W.2d 246, 250 (Minn. 1988), and State v. Bellotti, 383 N.W.2d at 312, admission of the name of the alleged perpetrator through medical records

was held to be harmless error. However, in neither Dana nor Bellotti was the identity of the alleged abuser found to be at issue. See Dana, 422 N.W.2d at 250; Bellotti, 383 N.W.2d at 312. Further, in both cases the other evidence was substantial. See Dana, 422 N.W.2d at 247-48 (warranted search of premises where alleged abuse took place revealed physical evidence and photographs corroborating victims' stories); Bellotti, 383 N.W.2d at 311 (defendant confessed to "touching" victims and states that he "couldn't explain his actions"). In this case, because of certain references in the record to an unidentified person, "Chiney," the identity of the alleged abuser is not completely certain. Additionally, upon exclusion of the contested out-of-court statements, the remaining evidence in this case is considerably weaker than that in either Dana or Bellotti. Significantly,

exclusion of the out-of-court statements eliminates any direct reference to appellant as the abuser. We are disinclined, on the strength of the record before us, to extend the rationale of the Dana and Bellotti cases to the extent necessary to affirm this conviction.

Our hesitancy to affirm this conviction has a mirror image, however. In view of the record before us, and especially in view of what we conclude may be a flawed competency determination, we are equally hesitant to reverse and remand for a new trial. Mindful of the supreme court's admonition in State v. Burns, 394 N.W.2d 495, 497 (Minn. 1986) that "a new trial is not necessary if some other lesser remedy * * * would be more appropriate," we re-examine that portion of the record which is the genesis for both the error and the insufficient evidence perceived by this

court earlier in this opinion.

Under the dichotomy of Minn. Stat. § 595.02, subd. 3(b)(i) and (ii), B.L.L.'s out-of-court statements were admissible only if she either testified or was unavailable to do so. Here, the trial court's ruling that B.L.L. was competent removed her from the "unavailable" category, see Minn. Stat. § 595.02, subd. 3 ("An unavailable witness includes an incompetent witness") and thus made her testimony indispensable for the admission of her out-of-court statements. The trial court's declaration that "neither party * * * has to call [B.L.L.] if they don't wish to do so" suggests that if my not have considered that once B.L.L. was found competent to testify, her out-of-court statements could be received into evidence only if, in fact, she did testify. Such a consideration is implicit in a competency

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determination in a case where admission of evidence under section 595.02, subd. 3 is also involved.[3] We cannot be certain what the trial court's ruling regarding B.L.L.'s

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[3]We are aware that under Minn. Stat. 595.02, subd. 1(1), (1988),

> [a] child under ten years of age is a competent witness unless the court finds that the child lacks the capacity to remember or to relate truthfully facts respecting which the child is examined.

However, because protection of a child sex abuse victim from the trauma of testimony has been recognized as an important public policy, see Minn. Stat. 595.02, subd. 4 (1988) (provision for video\close circuit testimony of a child victim where normal testimonial circumstances might "psychologically traumatize the witness so as to render the witness unavailable") and Coy v. Iowa, ___ U.S. ___, ___, 108 S.Ct. 2798, 2805 (O'Connor, J. concurring) (protection of a child sex abuse victim from the trauma of testimony is "an important public policy" and a "compelling state interest"), we believe that the testimonial ramifications on a child of determining that child to be competent to testify must also be considered in determining whether he or she is actually competent to testify.

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competency would have been had it focused on the statutory effect that ruling would have had on the prerequisites for admission of her out-of-court statements. Our uncertainty as to the range of factors considered by the trial court when it answered the question "Is B.L.L. competent?" requires a remand. Our attempt to comply with the dictates of Burns convinces us that the remand should not be for a new trial, but for a clarification by the trial court of the basis for its competency determination and a demonstration of its recognition of the impact of a finding of competency in light of Minn. Stat. § 595.02, subd. 3(b).[1]

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[1]On remand the trial court should re-enunciate and clarify the basis for its original competency determination. If the re-enunciation and clarification demonstrates actual consideration of the testimonial ramifications on the child of the competency determination, the original determination should stand and a new trial be granted. If the re-enunciation and

III.

Finally, appellant argues that, because the trial court erred in denying one of his challenges of a juror for cause, he was "deprived of his right to a fair trial."

To successfully appeal based on juror bias,

> appellant must show that the challenged juror was subject to challenge for cause, that actual prejudice resulted from the failure to dismiss, and that appropriate objection was made by appellant.

State v. Stufflebean, 329 N.W.2d 314, 317 (Minn. 1983). Additionally,

> [t]he [trial] judge, * * * should be given deference in determining if a juror should be removed for cause.

State v. Graham, 371 N.W.2d 204, 206 (Minn. 1985).

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clarification demonstrates that the competency determination was made without such consideration, the trial court should then re-evaluate its original competency determination.

Because the challenged juror indicated that her strong feelings regarding sex abuse cases could possibly affect her approach to the case, she was challenged for cause under Minn. R. Crim P. 26.02, subd. 5(1) which allows a challenge for:

> [t]he existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the party challenging.

Upon voir dire, the juror indicated that she "would try" to be unbiased, that she had success doing so in the past and that she did not have "any difficulty with the concept that the purpose of a juror is to determine whether or not there was abuse." However, she subsequently stated that her sympathy for abuse victims "may" get in the way of impartially determining whether abuse had occurred, but that she would "try to set it aside." The trial

court then denied appellant's challenge of the juror for cause.

It has been stated that

> [t]he test of an impartial juror is * * * that he "can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

State v. Andrews, 282 Minn. 386, 394, 165 N.W.2d 528, 534 (1969) (quoting Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1643 (1961)). More recently, the supreme court has indicated:

> If * * * the jurors indicate their intention to set aside any preconceived notions, and demonstrate to the satisfaction of the trial judge that they are able to do so, [an appellate court] will not lightly substitute its own judgment.

State v. Howard, 324 N.W.2d 216, 220 (Minn. 1982) (emphasis added). Additionally, this court has held:

> A juror must simply undertake to try the case fairly, and the trial judge, being in the best position to observe the demeanor of the prospective juror, is to

be given deference in determining whether the juror should be removed for cause.

State v. Alladin, 408 N.W.2d 642, 650 (Minn. Ct. App. 1987), pet. for rev. denied (Minn. Aug. 12, 1987) (emphasis added). Considering the juror's indication that she intended to put her feelings aside and that she had successfully done so in the past, we conclude that the juror had the requisite intent and ability to be impartial required by Andrews and Alladin. Thus, the trial court did not abuse its discretion in denying appellant's challenge of the juror for cause. In view of our determination that the trial court did not err in refusing to dismiss the juror, we need not address the issue of whether actual prejudice resulted from the trial court's failure to dismiss the juror.

D E C I S I O N

Appellant's Sixth Amendment right to

confront his accuser was violated by the trial court's admission of B.L.L.'s out-of-court statements where B.L.L. neither testified nor was unavailable to testify. This constitutional defect was not remedied by the fact that appellant could have called B.L.L. to testify, as this fact put appellant in a quandary by requiring him to choose between his right to have the state prove its case beyond a reasonable doubt and his right to confront his accuser. Because the excision of B.L.L.'s out-of-court statements, required for compliance with Minn. Stat. § 595.02, subd. 2, reduces the record to a level which does not support the conviction, and because of the trial court's and the parties' failure to focus on implications of the competency determination, we must remand for a re-enunciation of the basis for the trial court's determination that B.L.L. was

competent to testify.

Remanded for further proceedings not inconsistent with this opinion.

Doris Huspeni
October 18, 1989

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RANDALL, Judge, dissenting

I respectfully dissent. I agree with the majority on issue one wherein they find that when a child witness found competent and available to testify is not called to the stand, it is plain error to admit her hearsay communications as substantive evidence. I agree with the majority that, absent the improperly admitted hearsay, there was insufficient evidence to sustain appellant's conviction. There was no "other overwhelming evidence of guilty" here, and thus I agree with the majority's conclusion that, due to clear error revolving around a constitution defect, relief for appellant is mandated. I further agree with the majority on its confrontation analysis and its Dana and Bellotti analysis. I also agree with the majority's handling of issue three relating

to the challenge to a juror for cause. However, I strongly disagree with the majority's conclusion that the relief called for is not reversal and remand for a new trial, but a pure remand to allow the trial court to reconsider and clarify an unappealed issue, namely the pretrial determination that the child witness was competent to testify. The majority mandates the trial court to "clarify" and "reenunciate" whether he had in mind Minn. Stat. § 595.02, subd. 3 when he ruled B.L.L. competent to testify.

It is hard to get a handle on what the majority is doing because I find no precedent in the State of Minnesota or elsewhere for a straight remand[1] to a trial

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[1]This is not a postconviction hearing. This is a straight appeal on claimed errors of law which is a defendant's right in a criminal case. In a criminal case a defendant has no obligation to make post-trial motions to correct errors, as is required in a civil case, in order not to

judge in a felony case to "clarify" a pretrial ruling that resulted in, as the majority and I agree, the later improper admission at trial of evidence that cannot be handled by the "harmless error" doctrine.

I emphasize that the trial court conducted a proper pretrial competency hearing pursuant to a timely request by one of the parties and found B.L.L. competent to testify (this competency hearing was held on August 30, 1988, and B.L.L. was five years and three months old). The state did not seek relief from that August 30th pretrial hearing and claim that the trial court had erroneously found her competent to testify, and that the ruling would have a critical impact on the trial. The state had that right at that time to

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limit the appeal to sufficiency of the evidence.

challenge this pretrial competency ruling pursuant to the procedure open to them under Minn. R. Crim. P. 28.04. The state did not, and all applicable time limits on pretrial rulings by the state have long since expired.

Thus, the competency of B.L.L. to testify is not an issue in the process of analysis of this case. She was ruled competent at a proper hearing timely motioned. The finding of competency was not appealed and is not before us. Arndt v. American Family Insurance Co., 394 N.W.2d 791, 793 (Minn. 1986)(Minn. R. Civ. App. P. 106 bars consideration of issues not raised by filing notice of review); see also Minn. R. Crim. P. 28.01, subd. 2 (rules of civil appellate procedure apply in criminal cases except as otherwise provided). In fact, the majority relies on the trial court's finding of competency to

support its conclusion that the admission for B.L.L.'s hearsay statements was plain and substantial error! Yet, having said that, the majority goes on with strained reasoning to conclude that they found "what may be a flawed competency hearing." The majority gives as its reason that they have "uncertainty as to the range of factors considered by the trial court when it answered the question, 'Is B.L.L. competent?'" An examination of settled law on the criteria for the competency of child witnesses discloses one, and only one, terse and succinct statute:

> A child under ten years of age is a competent witness unless the court finds that the child lacks the capacity to remember or to relate truthfully facts respecting which the child is examined. A child describing any act or event may use language appropriate for a child of that age.

Minn. Stat. § 595.02, subd. 1(1).

The only factors a trial court can

consider are the child's ability to remember or relate truthfully facts on which the child is questioned. The August 30th finding of competency was not challenged by the prosecution before trial, is not challenged by the defendant in his post conviction appeal, and thus becomes the law of the case. The majority discusses § 595.02, subd. 1(1), the controlling statute, in terms of "public policy" and the effect that testimonial circumstances might have on a witness. The majority's citation of Minn. Stat. § 595.02, subd. 4 (1988) and Justice O'Connor's concurrence in Coy v. Iowa, ___ U.S. ___, ___, 108 S.Ct. 2798, 2805 (1988) to suggest that public policy supports they "testimonial ramifications" tint on Minn. Stat. § 595.02, subd. 3 is out of context. Neither § 595.02, subd. 4 nor Justice O'Connor's remarks in Coy address a

competency determination. Both presume that the child witness has already been found competent and speak to whether or not the child witness may avoid a physical confrontation (e.g. courtroom shields, video taping, et cetera) with the accused during the child witness's testimony.

The majority does not find that, although competency was not appealed, their review of the record establishes that B.L.L. lacked the capacity to remember and relate facts truthfully. Instead, the issue the majority wants addressed on remand is what would the trial court's ruling on B.L.L.'s competency have been had the trial court realized that by finding B.L.L. competent the state could not have B.L.L.'s out-of-court statements admitted as substantive evidence unless B.L.L. testified at trial pursuant to Minn. Stat. § 595.02, subd. 3(b)(i). In plain English,

the majority criticizes the trial court and remands for clarification because the trial court did not set out in its finding of competency that it had considered what possible trial tactics and what possible production of witnesses the defense and prosecution would have to explore depending on which way the trial court's ruling on competency went. I suggest it is the job only of defense counsel and prosecutor to choose trial tactics, including the production of evidence and witnesses, that they deem in their best judgment to serve their client. It is not for a trial judge, faced with an important pretrial ruling, to consider whether the outcome may or may not harm the defendant's case or the prosecution's case. However, that is implicit in the criticism leveled by the majority at the trial court.

On types of issues that come up for

pretrial rulings, e.g., suppression of evidence, admission of confessions, competency, a trial court's only protection form outside pressure and criticism is the ability to decide the issue on the law and the facts. The majority cannot bypass or escape this issue. Their analysis boldly states that they want the trial court to demonstrate "its recognition of the impact of a finding of competency in light of Minn. Stat. § 595.02, subd. 3(b)." The majority further states:

> It appears that the import of the ruling that B.L.L. was competent to testify was not fully explored by the trial court.

The majority's remand is foreign to the simply dictates of the controlling statute § 595.02, subd. 1(1).

The majority attempts to rationalize a straight "remand" without a reversal by relying on State v. Burns, 394 N.W.2d 495, 497 (Minn. 1986). Even a cursory reading

of Burns discloses that the facts and holding of Burns are inapposite to this case. In Burns, the supreme court addressed the trial court's failure to hold the requisite § 595.02 pretrial hearing concerning out-of-court statements by child sex abuse victims. The holding of Burns was that the defendant did not timely object to the lack of a hearing; and further that the record clearly contained enough evidence of guilt so that the lack of hearing, coupled with the failure to object, was harmless error. The pure holding of Burns is that the lack of timely objection and a harmless error analysis combined to uphold a conviction. On our facts, a competency hearing was held. No one appealed the result of the hearing, and thus the finding of competency becomes the law of the case. In addition, the majority does not analyze this case on the basis

that the improperly admitted statements were harmless error, but emphasize, as I do, that admitting the statements was clear and substantial error, as the other evidence was insufficient to sustain the conviction. The supreme court in Burns did not speak to what they would have done had they found the failure to conduct the pretrial hearing to be a constitutional defect, and that it could not be considered harmless error because the other evidence left could not sustain the conviction.

The majority attempts to slide under Burns by taking a statement from Burns which indicates that an award of a new trial is not necessary if some other lesser remedy would be more appropriate. Id. at 497. The Burns court set out two examples; State v. Causey, 257 N.W.2d 288 (Minn. 1977) and Doane v. State, 290 Minn. 105, 186 N.W.2d 518 (1971). An examination of

both cases indicates no applicability to the facts of this case. Causey involved a timely challenge to the propriety of a search warrant. The challenge was overruled by the trial court and the state was allowed to admit evidence discovered in the search. Based on this evidence, the defendant was convicted. On appeal, the defendant argued that his motion to suppress was erroneously denied. The appeal turned on the sufficiency and accuracy of affidavits submitted in support of the request for a warrant. The supreme court remanded the case to the trial court for a post-trial determination of the state of mind of the government agent who made misrepresentations in the affidavit supporting the warrant. Thus, in Causey, the issue of the trial court's pretrial suppression order was properly before the court because an objection was noted to the

admission of the evidence before trial, and the trial court's ruling on the objection was appealed.

Here, we have a pretrial competency hearing, properly conducted, from which no appeal was taken by the state. Nevertheless, the majority sends this case back to the trial court to reconsider its competency ruling in light of factors not contained in the statute governing the competency of child witnesses.

The next case which the Burns court mentioned in passing as indicating that a remand may be appropriate, depending on the facts, is Doane. Doane was a 1971 case that preceded the modern rules of criminal procedure (which took effect on July 1, 1975) which now control pretrial hearings on admission and suppression of evidence through Minn. R. Crim. P. 11. In Doane, despite defendant's contention that his

confessions resulted from coercion and intimidation by the investigating officers, defendant's statements were received in evidence over timely objection. The issue in Doane was whether there had been the pre-modern rule of criminal procedure separate hearing on the issue of voluntariness. See Jackson v. Denno, 378 U.S. 368 (1964). The supreme court simply found that based on the record the defendant's timely objection to the admission of his inculpatory statements that a question remained as to whether the Jackson standards had been fairly met. Thus, there was a remand to the trial court to ensure that the defendant's confession had been voluntarily obtained. Again, the essential elements of Doane are that a timely objection to the admission of evidence was made, and the supreme court, not sure that the proper pretrial hearing

had been held, and, noting the timely objection, remanded for a full hearing on defendant's contentions.

Although the analysis of both the majority and this dissent is complex, the majority's decision is clear and crystalizes the problem. The majority found the appellant's sixth amendment right to confront and cross-examine his accusers was violated. The majority finds that this constitutional defect could not be remedied by a harmless error analysis. The majority finds that with the suppression of the improperly admitted hearsay statements, the record is insufficient to support the conviction and thus the error is not harmless and mandates relief. But the relief granted is a remand for reconsideration of the child witness's competency, and the majority premises that remand, not on the statute controlling how

a trial court determines competency of child witnesses, but on a demand that the trial court second guess its pretrial ruling of competency based on the knowledge that should the competency ruling stand, he must grant appellant a new trial.

The majority tips off the trial judge that should he clarify the unappealed competency ruling made over one year ago (August 30, 1988) and now change his mind and rule himself in error and find that B.L.L. was incompetent, the conviction will stand because the dictates of § 595.02, subd. 3(b)(ii) will not be met. I believe such a remand is unprecedented and puts the trial judge in an untenable position. He is told that he has erred, not in finding B.L.L. competent, but in allowing her out-of-court statements to be heard by the jury when the state did not call her as a witness. He is then told that his error in

allowing in those hearsay statements is clear and substantial error and will mandate a new trial for the defendant unless he reconsiders and clarifies that ruling of competency, and reverses himself on it. Assume the trial court, at the original August 30th hearing or on remand, finds B.L.L., pursuant to the controlling statute, able to relate and remember facts, but specifically enters a finding of incompetency so that the state can use her out-of-court statements as substantive evidence pursuant to § 595.02, subd. 3(b)(ii). The defendant has not been improperly denied access to a witness. (The defendant in a criminal case has as much right to subpoena the victim as a witness as does the prosecution.) The defense in this type of case might well hold off its final decision whether to subpoena the child to testify, if the state

does not, depending on how it views the strengths of the state's case, and other intangibles and subjective elements that are best left to the discretion of the trial attorney. Suppose, mid-trial, he now states as part of the defense case-in-chief an intention to subpoena the victim and the trial court says, "sorry, but you can't, I ruled her incompetent." The defense attorney says, "but on the statutory criteria of her ability to relate and remember, you found she had passed." The trial court replies, "but now I am told I have to factor into the finding of competency a recognition that how I rule will affect the state's production of proof." This is precisely where the majority's analysis is heading the trial court.

The majority's decision creates a series of hydra-headed issues. First, if

the trial court on remand clarifies the competency ruling, decides he was wrong, the rules B.L.L. retroactively incompetent, does the defendant have standing to appeal that? The defendant did not place the pretrial ruling of competency as an issue before this court as part of his post-trial appeal. Is the trial court's "clarification" order appealable?

Second, if, as I suspect might happen, the trial court sticks by its August 30 competency ruling that B.L.L. was able to relate and remember, and that he does not intend to factor into § 595.02, subd. 1(1) how competency might affect the trial tactics of the prosecution and the defense, does the state now get another appeal to this court challenging the trial court's clarification? I assume the trial judge felt he was right when he first ruled B.L.L. competent. I assume he applied only

the criteria set out in the statute, I can think of none other that he could.

The concept of a trial court being asked to acknowledge (speculate) the effect of the evidence either side may have to produce, depending on a pretrial ruling, is dangerous when examined in the light of day. Trial decisions by attorneys as to what witnesses to call or to have on their witness list but not call can and may properly change from day to day and hour to hour in a trial. A defense attorney or a prosecutor may, at a pretrial hearing, honestly indicate a predisposition to put this witness or that defendant on the stand or to submit this document and not that one, and yet each attorney reserves an absolute right to change his mind depending on the progress of the trial to date. For example, in this case the state may have had an announced pretrial disposition not

to call B.L.L. as a witness, even though they knew she was available. The state could have properly and honorably changed its mind and put her on the stand. The defendant may have had an announced honest pretrial disposition not to subpoena her as a witness if the state did not. The defense attorney could have properly changed his mind at trial and issued a subpoena for her attendance. The burden to a trial court at a pretrial hearing speculating as to what the import of ruling on any issue will do to a party's trial tactics is so intolerable it should not be imposed. Trial judges should be allowed to make pretrial rulings without having to engage in such speculation, and let the correctness of those rulings be answered on appeal.

For all the above reasons, since I agree with the majority that there was

clear and substantial error, I find the only honest solution is a reversal and a remand for a new trial.

The state still controls future production of witnesses and its ability to comply with the dictates of § 595.02. First of all, at the second trial, either party can appropriately request the trial court for a second pretrial competency hearing. B.L.L. was born on May 30, 1983, and thus is now approximately six and one-half years old. At that age, emotional maturity and the mental capacity of child witnesses to remember and relate truthfully in their own language facts that happened to them may change from year to year and even over shorter spans. The fact that B.L.L. was ruled competent on August 30, 1988, is not res judicata as to a new hearing before a second trial. She is not, and never has been, adjudicated legally

incompetent, and her competency at a second trial is only subject to the plain language of § 595.02, subd. 1(1).

Following the second competency hearing, the state has the controlling statute § 595.02 squarely in front of it. Should she again be found competent to testify, the state will be faced with the simple trial decision of whether to put her on the stand and comply with § 595.02, subd. 3(b)(i) or attempt to make its case against defendant without her out-of-court statements, but with whatever other admissible evidence it has. On the other hand, should she now be found incompetent to testify, the sate can attempt to make its case in compliance with the dictates of § 595.02, subd. 3(b)(ii).

This, to me, is a better result and in compliance with an accused's right to a fair trial and a fair appeal. With the

majority's analysis, there is not so subtle pressure on the trial court to clarify an unappealed pretrial competency hearing, and reverse itself knowing then that the conviction will stand. My analysis leads to a second trial where again an objective competency hearing could be requested, and, following that decision, each party is free to plan trial strategy and product the witnesses it deems proper.

I strongly dissent and would reverse and remand for a new trial for all the reasons stated above.

Judge Randall
October 18, 1989

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STATE OF MINNESOTA

x SUPREME COURT
COURT OF APPEALS

State of Minnesota,

Respondent,

JUDGMENT

vs.

C2-88-2379
Appellate Court
Case Number

Bruce Phillip Larson,

K-87-1265

Trial Court Case
Number

Appellant.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to wit, of the District Court within and for the County of Martin be and the same hereby is affirmed and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT May 18, 1990 By: /s/ S. Heikkila Assistant Clerk

APP. D P. 1